

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

3 BALLARD, ET AL :
4 :
5 vs : 3:18-CV-121

7 NAVIENT CORPORATION, ET :
AL :
8 :

9 BEFORE: THE HONORABLE MALACHY E. MANNION
10 PLACE: COURTROOM NO. 3
11 PROCEEDINGS: ORAL ARGUMENT
12 DATE: MONDAY, JANUARY 7, 2019

13 APPEARANCES

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1 THE COURT: We're here on Ballard, Varno and Pokorini
2 on behalf of themselves and class members against Navient
3 Corporation, Navient Solutions, Inc., and Navient Solutions, L.
4 L. C. The civil number is 3:18-121. Pending before the Court
5 are motions to dismiss effectively the case in its entirety and
6 responses from the plaintiffs, and counsel have requested oral
7 argument.

8 I will note that I have received and reviewed the
9 motion to dismiss, the brief in support, the brief in
10 opposition and the reply brief as well. And for counsel, I see
11 Mr. Sabatini here for the plaintiff. I assume we have Mr.
12 Fiorentino and Mr. Edelman?

13 MR. EDELMAN: Yes, Your Honor.

14 THE COURT: For the defendants we have Ms. Simonetti?

15 MS. SIMONETTI: Yes, Your Honor.

16 THE COURT: I feel bad you all have come from a
17 distance. Coming from Chicago you can get in here two ways,
18 either United or American without stopping anyplace. But
19 coming from California, you have to go -- I'm not -- Chicago,
20 Philadelphia, Atlanta or someplace to get here --

21 MS. SIMONETTI: Charlotte.

22 THE COURT: You did American, okay. You are all
23 scheduled to go back out tonight?

24 MR. EDELMAN: Yes, Your Honor.

25 MS. SIMONETTI: I am not, Your Honor. I can't get

1 back tonight. I am waiting for the sleet and snow to melt.

2 THE COURT: Well, you know, you never know what we're
3 actually going to get. They are usually pretty good at the
4 airport. Are you flying back to Charlotte or Philadelphia.

5 MS. SIMONETTI: Charlotte.

6 THE COURT: The 6 a.m.?

7 MS. SIMONETTI: 11:30 I think.

8 THE COURT: That's good because even if there is bad
9 weather, they'll have time to have clean the runways. And then
10 since you're going to Charlotte where the weather is not
11 supposed to be bad theoretically going in that direction, you
12 will be able to get through. You gentleman -- did you take
13 United or American?

14 MR. EDELMAN: We went through Philadelphia and drove.

15 THE COURT: So are you flying back to Philadelphia or
16 directly back to Chicago?

17 MR. EDELMAN: Driving back to Philadelphia.

18 THE COURT: Oh, you drove. Well, we will begin with
19 the defense since it's your motion. Now, I know that I --
20 there are a number of different issues obviously on here.
21 You're welcome to speak to any or all of those that you wish to
22 draw my attention with more specificity. I did want to mention
23 and ask you a question, Ms. Simonetti. It's my understanding
24 that Navient is also a defendant in a relatively similar matter
25 in front of Judge Mariani in this Court; is that correct?

1 MS. SIMONETTI: Would you like me to speak from here?

2 THE COURT: From there. You can pull the microphone
3 down. Everyone, you can speak sitting, standing, running,
4 jumping or laying. Whatever makes you comfortable is okay with
5 me. There's no formalities here.

6 MS. SIMONETTI: All right. I am very familiar with
7 the matters pending before Judge Mariani. There is a matter
8 that is brought by the CFPB and another state attorneys general
9 and also one proposed class action. But those matters are not
10 similar to this. I will disagree with that. The primary
11 theory that runs through those cases is that the defendants can
12 properly steer borrowers into forbearance when they should
13 otherwise be put into the various forms of income driven
14 repayment programs that are available.

15 So that is a different theory than the companies
16 failed to process these applications that were submitted for
17 the IDR programs. And there -- just in terms of status, there
18 has been motion practice in the government actions before Judge
19 Mariani, and there is a pending motion to dismiss and a motion
20 to strike in the private class action that's been pending for
21 quite a while. And that is the status. But I don't agree they
22 are similar.

23 In fact, if you look at the order that was recently
24 submitted by plaintiffs in the Pennsylvania case, much of it
25 has to do with preemption, which is not an issue here. There

1 are a number of distinctions even in the claims setting aside
2 legal theory --

3 THE COURT: Now, but that last one you're speaking of
4 is the attorneys general action, which is a somewhat of a
5 different entity in and of itself because of the party that's
6 involved in case. The other action -- class action -- the
7 underlying meat of the action appears to be that Navient
8 somehow was -- I don't know the verbiage I will use here --
9 somehow, as you put, steering people into forbearance as
10 opposed to -- just steering people into forbearance.

11 When I look at this action, not necessarily the way
12 it's pled by the parties or the other action where it's pled by
13 counsel since they are different counsel and plead things in
14 different ways -- the allegations are here generally to me
15 similar. That is, that somebody applies for IDR and that --
16 allegedly timely applies for either IDR or to re-up their IDR
17 after a period of time and it's delayed and the result of the
18 delay is people get put into forbearance. And the argument on
19 both sides are Navient benefits from that to the extent that
20 accrued interest now becomes capitalized as principle and they
21 made money on that.

22 I mean, it looks to me like the -- however it's being
23 -- whatever the verbiage is by different counsel in the case,
24 it strikes me the underlying activity relates to whether or not
25 somebody should be in the IDR program and whether or not

1 instead of that occurring or continuing to occur that
2 forbearance takes place and the result is allegedly, you know,
3 more ability for Navient to service and, therefore, a longer
4 period of time for them to collect fees and things of that
5 nature. Is that --

6 MS. SIMONETTI: I agree the programs are the same
7 you're talking about. But the theory is different in that in
8 those other actions before Judge Mariani the primary allegation
9 is this steering, which means that forbearance would always be
10 offered and IDR would not be offered. This is different in
11 that these borrowers are applying for IDR believing that they
12 might be entitled to it or they are renewing IDR because they
13 have already been entitled to it, they need to recertify their
14 entitlement. So I think the theories are different. I don't
15 think the lawyers necessarily would agree on the plaintiffs
16 side the theories are the same. I think they would point those
17 differences as well.

18 The defense raised in the Mariani class action are
19 different as noted. There's preemption defenses not raised
20 here and different contractual theories and other issues. So I
21 agree with you that the programs are the same, but the theory
22 is actually not the same from my point of view.

23 THE COURT: Let me ask you, are you handling these
24 matters for -- it was surprising to me that in the Middle
25 District of Pennsylvania -- more particularly in Scranton that

1 there would be effectively three cases that -- the attorney
2 general's case to the extent one wants to call that a class
3 action -- the private case that Mariani has and then this one
4 that I have. I was surprised at that, and I am --

5 MS. SIMONETTI: That's because there's a servicing
6 center for Navient Solutions in Wilkes-Barre. I'm probably not
7 saying that right.

8 THE COURT: No, you did. That was good.

9 Wilkes-Barre.

10 MS. SIMONETTI: Yes, that's the reason we have cases
11 pending here. I am counsel for the companies in just the
12 private class action. There are other firms involved in the
13 state versus federal case.

14 THE COURT: All right. Why don't I let you speak to
15 the issues that you wish to speak to?

16 MS. SIMONETTI: So there's a lot of extensive
17 briefing. Overall I think this matter calls out for a
18 practical result. On the motion to strike, I think this is one
19 of the unique circumstances where individualized issues are
20 plain from the pleading. We don't often make motions to
21 strike. I understand they are disfavored in most
22 circumstances, but this is one of those rare factual allegation
23 circumstances where it is an appropriate motion. We have
24 discussed the plaintiff's particular facts in the briefing, so
25 I won't go over that with you again. I think the best evidence

1 in support of those arguments is the application form itself,
2 which we have attached to our reply. It's docket number 48-1.
3 It's a very extensive ten-page form. It asks for certification
4 of various -- you know, marital status, family status, what's
5 your income. You have to submit documentation with respect to
6 income, tax information. And the last section before the
7 signature, there's a number of certifications. And the first
8 one says, if I do not provide my loan holder with this
9 completed form and other required documentation, I will not be
10 placed on the plan that I requested or my request for
11 recertification or recalculation will not be processed.

12 So I think that clearly contemplates that these forms
13 won't be submitted properly or won't be submitted completely,
14 may not be submitted on time and that the companies will have
15 to work through with borrowers when they send the
16 documentation, what they sent, where did they send it, you
17 know, was it complete, did they apply for the right program.
18 And I think that's why the motion to strike is appropriate and
19 should be granted.

20 And the same thing with respect to the motion to
21 dismiss, practical way to look at this is the Higher Education
22 Act does not contain a private right of action and these
23 contract claims in effect would circumvent the structure of the
24 law to allow for these causes of action incorporating the terms
25 of the Higher Education Act where those claims can be brought.

1 If congress wanted to include a private right of action, it
2 could have. It could do so now, but it hasn't. And so the
3 structure of the law, I think, does not permit the claims that
4 are being brought here on contractual basis. And then
5 meanwhile with respect to the -- what's called the Consumer
6 Protection Law claims, the state law claims, New York,
7 California, Illinois, there are no misrepresentations that are
8 alleged in the complaint with respect to the fact -- any fact
9 -- for example, there's no allegation that says there was
10 representation to the plaintiff from Illinois that there would
11 be processing within a certain time frame. And that doesn't
12 appear in the regulations either. If you notice in the amended
13 complaint, the time for completion of the applications is a bit
14 of a moving target.

15 But since there's no misrepresentation alleged, there
16 couldn't be any reliance. That's my pitch for the practical
17 view of these claims here. I think the briefing is complete,
18 especially the reply.

19 THE COURT: Let me move to plaintiff's counsel. I
20 will let you speak to whatever you would like to speak to. I
21 am interested in the issue that was the first one that was
22 relayed, and that was on the application itself. And looking
23 at the various -- you know, in your amended complaint you
24 indicate that there's potentially millions of people here,
25 hence millions of applications, all of which may have different

1 information, background that needs to be reviewed, needs to be
2 mentioned, brought in. And I am concerned about that in
3 deciding whether or not there's a class that makes sense.

4 Before I get to that, I want to ask you on that
5 issue, based upon that certification that you referred to, is
6 it Navient's position that if somebody timely filed their
7 application but it didn't cross all of the T.s and dot all of
8 the I.s that in those circumstances that if they received an
9 application that for whatever reason Navient determined was
10 either incomplete that -- did that mean that at that point in
11 time they would consider the person at least temporarily either
12 ineligible or not having renewed their IDR and, therefore,
13 automatically go into forbearance pending receiving the
14 follow-up information or whatever it may be?

15 MS. SIMONETTI: I think that what would happen -- it
16 would depend whether the application actually can be processed.
17 If there was enough information there that it could be
18 processed because there's a calculation, a formula that goes
19 into IDR entitlement on the application process itself. And
20 it's a government program. So the entitlements is driven by
21 the Department of Education. So I think the issue would be
22 whether, in fact, an application just could not be processed --
23 not sort of a -- you know, there was some minor problem with
24 documentation or something like that that can't be processed
25 and then that's the problem.

1 THE COURT: I should know this from reading the
2 documentation. I can't remember exactly. Wasn't there
3 initially some sort of time frame -- was it 25 days -- there
4 was some time frame within which if an applicant made an
5 application that it was supposed to be processed by Navient?

6 MS. SIMONETTI: That was suggested by plaintiffs with
7 respect to a new application, I believe. That's not a
8 requirement that appears in the regulations, and that was also
9 withdrawn. If I can look back and confirm that's exactly
10 right. But there's no firm timeline for completion of a new
11 application.

12 THE COURT: So let me ask you, how does that
13 practically work then? So I supply my reapplication after a
14 year, which is more of the circumstance that fit into the three
15 plaintiffs that we listed here, and I -- for some reason it's
16 not complete. What does that mean then practically? Like, can
17 Navient, for example, push it off to the side and say, okay,
18 that was not complete, we will put into the pile of not
19 completes, and that could be a week, could be a month, it could
20 be six months before all of that is done, is there any internal
21 -- are there any government regulations? Are there any time
22 frames involved, and what are the time frames?

23 MS. SIMONETTI: So if they are a new application, the
24 requirement is to process them promptly. So that is -- that's
25 an open ended word. Promptly. It depends what is received.

1 And with respect to your renewal application, my understanding
2 it would be processed before the time for expiration, you know,
3 barring some sort of an issue with the documentation or --

4 THE COURT: Is there a requirement or regulation as
5 to how long before the year renewal to submit the documentation
6 in order to be reviewed?

7 MS. SIMONETTI: In the regulations, I don't recall
8 seeing that.

9 THE COURT: Or any kind of writings or statements
10 that Navient sends out to people or any kind of information
11 about the IDR program or that you got to renew it each year?
12 Does it indicate you must -- there is some time frame within it
13 must be renewed?

14 MS. SIMONETTI: There is a time frame. I am sure
15 there's communication. It is alleged here there's
16 communication, but we don't have that in the record. It's not
17 attached to the complaint.

18 THE COURT: Do you know what the time frame is?

19 MS. SIMONETTI: I want to say something like 60 days,
20 but I can't swear to that. There's communication that goes out
21 you're coming up for annual renewal, you have to submit the
22 information to recertify. It's submitted. But there's nothing
23 in the regulations that's been identified, and none of those
24 documents have been put forth here in the amended complaint.

25 THE COURT: Okay. Let me ask you -- okay. Let me

1 ask you also on recertification. Is there any writing that
2 you're aware of that goes out that indicates to people on
3 recertification that if you don't timely recertify that the
4 consequence is that you will be put into forbearance as opposed
5 to that you'll be -- you will continue on in IDR pending the
6 resolution of whatever the problems are?

7 In other words, is there communication between
8 Navient and the borrowers about what the consequences are of
9 failing to be timely or to not being complete in a renewal
10 application?

11 MS. SIMONETTI: I don't want to swear to the content
12 of all of the disclosures that go out. There are lots of
13 disclosures that go out in connection with these programs.
14 I've seen letters calling out various types of discrepancies
15 and problems with applications from -- frankly from -- more
16 from the other case because it involves IDR programs. And I am
17 sure there's a communication. Do I have it committed to
18 memory? I don't. But it's a stream of communication with
19 borrowers letting them know that this process is underway, they
20 have to do the annual recertification and if they don't do it,
21 obviously there will be consequences. And I have seen certain
22 legal descriptions, but I don't want to swear this is when it
23 goes out and this is exactly what it says.

24 THE COURT: I don't want to you do that. My question
25 is, are you aware of whether or not that it indicates --

1 there's a signature difference between, for example, staying in
2 the IDR program if it turns out there's some, you know, minor
3 you know, problems, something didn't get there, whatever, and
4 going into forbearance changes significantly what happens to
5 their total loan and the amount they have to pay over time.

6 And so I am just wondering whether or not there's --
7 that you're aware of -- and if you're not, it doesn't mean it's
8 not -- I get that. Is there an articulation of, if you don't
9 do this in time, there is a negative consequence to you, and
10 that is, you will be kept in the same circumstance pending
11 your proper completion and if you don't properly complete, then
12 we will go back and then from the date you didn't complete,
13 then we'll, you know, forebear, and you will have additional
14 interest that goes to principle and a larger amount of loan to
15 pay as opposed to telling them that if you don't do this
16 timely, forbearance will kick in and that's the, you know, the
17 process we're using here. If you're not aware --

18 MS. SIMONETTI: That was a long disclosure. I feel
19 like I can't sign on to that. But I -- I would be -- there
20 probably is, Your Honor. It's a very standardized process.
21 But, you know, again, that was a long disclosure. I don't want
22 to sign on to that. But there certainly is communication. The
23 questions you're asking right now I think would go to the
24 motion to strike. It's a very individualized process. You're
25 working with people in all different types of status with

1 respect to their families and their jobs, and do they really
2 need a forbearance -- forbearance is a temporary thing -- do
3 they qualify for IDR. They are highly individualized facts.
4 Let me move to you, Mr. Edelman. Before I do, I want to start
5 with that same question. It does seem like there are an awful
6 lot of individualized requirements or facts.

7 I know that if you look at it -- if we try to look at
8 it as a simpler case, we can say it's just a question of
9 whether or not when somebody applies how long it takes Navient
10 to do it and whether or not if they don't get it done in the
11 time frame that allows the person to be re-upped, then they are
12 sent into forbearance and this all sounds very simple, but it
13 sounds to me like the real determination of whether or not
14 somebody gets IDR and whether on each yearly basis they are
15 able to re-up for IDR depending on what their financial
16 circumstances are at that time is literally unique for every
17 person that applies and on top of that whether they apply 60
18 days in advance, 30 days in advance, a week in advance, on the
19 day they are supposed to, whether or not when they applied in
20 60 days in advance their application was complete or had other
21 matters and how long it took Navient to be able to determine
22 that there was missing information that needed to be there, you
23 know, it seems to me that I have a concern here as to what
24 appears to be a very individualized process in each one of the
25 potential millions, as you put it, of borrowers. So I would

1 like you to address that first if you would.

2 MR. EDELMAN: Yes, Your Honor. The application is
3 actually fairly simple particularly for renewal. The questions
4 ask a person to identify what plan you want, to provide some
5 information as to whether your income has changed and if it has
6 changed, submit essentially one piece of paper documenting what
7 your income is, a pay stub, documentation of that nature.

8 Navient takes the information, puts it into its
9 computers. It is simply -- it is a simply administerial
10 process to identify from Navient's computer records whether an
11 application has been received and if Navient even claims
12 there's some problem with it. The difficulty -- what happens
13 -- this case actually in effect presents the explanation for
14 the steering allegations in the Commonwealth's complaint.

15 The income based repayment applications, particularly
16 in the case of renewals are not processed properly. The legal
17 requirement is one of prompt processing. At one point --

18 THE COURT: Now, is that for renewal or for --
19 counsel indicated for the defense, I believe that was for the
20 initial application but there was no language as to what the
21 timing is in renewal, is that correct or incorrect?

22 MR. EDELMAN: The language applies to the initial
23 application for renewals, once they enter it into their
24 computers they received the renewal application, they don't
25 indicate anything wrong with it, they are supposed to continue

1 the program until the renewal application is processed. In
2 fact, people wind up in forbearances, which are much more
3 detrimental to the borrowers and are not intended for use
4 except where, for example, you lose your job, you're ill,
5 there's some temporary problem.

6 THE COURT: Let me ask you on that question. So
7 you're saying that there is language that says that once they
8 receive your application that you are supposed to remain in the
9 program until it's processed?

10 MR. EDELMAN: That's correct. There's what is called
11 an administrative forbearance -- typically lasts 60 days in
12 which you basically continue in the program. The key to the
13 administrative forbearance is that interest is not capitalized,
14 the detriment to the consumer is not there. A number of -- a
15 proportion of persons, which is totally inappropriate given the
16 purpose of a hardship forbearance, it is placed in forbearance
17 status rather than income based renewal status. That is what
18 our complaint concerns.

19 THE COURT: Let me ask you, would it make a
20 difference if somebody -- if somebody applies and their
21 application is complete or complete enough that it can be
22 processed but it isn't processed in a prompt manner? In other
23 words, that the person applies and let's for argument sake, you
24 know, they get -- Navient gets it a week before and then by the
25 time they finish processing, it's three weeks later so it's

1 going past that, is there a difference between that and
2 somebody who files their application a week before but it is
3 incomplete, they have not sent whether they are married or
4 single, whether their spouse or whoever else it is has income,
5 what the total income -- something of significance in the
6 calculation, is that a difference or not a difference in terms
7 of whether or not in that circumstance one would be entitled to
8 remain in the program or whether or not they would potentially
9 be in forbearance until such time as they had supplied the
10 proper information?

11 MR. EDELMAN: First, whether that's the case should
12 be indicated by Navient's computer records. At some point --
13 some discrepancies might result in their not being in the
14 program. If Navient can -- let's say you're missing this and
15 it is promptly supplied, they should remain in.

16 THE COURT: Is there some time frame? What does that
17 mean? Does that mean we reach out to you and you give it to me
18 a month later and you get to stay in because you gave it to us,
19 or if it is past a deadline for renewal and they haven't
20 supplied something that is required to be supplied, who's the
21 burden on then in terms of them staying in the program? You
22 know, if I -- if my driver's license expires every four years
23 and I don't get it renewed and then I get a ticket because I
24 was busy or because I, you know, didn't have two forms of
25 identification or whatever it may be, it doesn't make any

1 difference.

2 The bottom line is I missed the deadline and so I
3 didn't qualify after that period of time. I got to pay my
4 ticket even though if I am entitled to get a new driver's
5 license, I just didn't get my photo taken. I guess my question
6 to you in that regard is -- I get your point if somebody
7 applies in advance and it's not processed in a timely manner,
8 meaning that's not their fault, they've got it to Navient and
9 Navient had sufficient information to process the renewal, then
10 it seems to me -- I get your point there. If they supplied the
11 information effectively in an untimely manner because even if
12 they get it in time but it's not complete for purposes of doing
13 whatever this algorithm is that this information that's fed
14 into the computer so it spits out whatever the percentage is
15 of, you know, your disposable income compared to whatever your
16 the loan is and it figures it out, then is -- is that something
17 that is Navient's fault so, therefore, they are required to
18 assume that somebody that hasn't filled out the application
19 properly or supplied the information -- are they required to
20 assume that they will and that, therefore, we just got to hold
21 it open even if they don't do it and if so how long? Is that a
22 week, a month, two months? What is it?

23 MR. EDELMAN: It may not be Navient's fault, but
24 instances in which there's incomplete documentation can be
25 readily identified from Navient's own computer records. And

1 those persons would not be part of the class or would not be
2 entitled to relief. The problem is --

3 THE COURT: Okay. So you are saying here the class
4 you're identifying is only those who have properly filed the
5 information and by no fault of their own effectively, Navient
6 hasn't in a timely manner processed those and as a result at
7 some point after the theoretical expiration of the initial
8 filing, that they've been now put into forbearance and,
9 therefore, had interest which is capitalized on to principle
10 and the result is they are paying either a higher amount or a
11 -- over the course a longer period of time.

12 So you're only talking about those people that have
13 properly filed -- when I say properly filed, I don't mean every
14 box is checked. I mean theoretically in Navient's entry into
15 the computer there is sufficient information for them prior to
16 the time of renewal to be able to make that determination
17 whether --

18 MR. EDELMAN: Yes, Your Honor, and those persons we
19 believe can be identified from Navient's own computer system.

20 THE COURT: Okay. All right.

21 MR. EDELMAN: Not only can they be readily
22 identified, but relief can be granted either in terms of money
23 or by requiring Navient to retroactively reprocess the
24 applications appropriately. In other words, not putting the
25 people into administrative forbearance where interest -- so

1 that interest is being capitalized and the loans are being
2 extended. So I think that a class can be readily identified
3 and certified and granted relief, and this can be done
4 essentially entirely on the basis of Navient's own computer
5 records.

6 It is not -- it does not require actual adjudication.
7 It simply requires an analysis of what Navient has in its own
8 computers. With respect to the argument that there's no
9 private right of action, the Higher Education Act specifies
10 that the government is going to enter into loan agreements,
11 promissory notes with private individuals.

12 The notes are -- are then serviced by Navient.
13 Navient is required to adhere to various provisions of the
14 Higher Education Act and regulations in conducting its
15 servicing activities. Where a statute requires the execution
16 of loan agreements or notes with private individuals, you don't
17 need a private cause of action. That's why there isn't one.
18 The notes are legally enforceable contracts. The question is,
19 enforceable for what? The assumption -- they obviously impose
20 a financial obligation of some extent on the borrower. The
21 issue is what extent. And that is a question which is
22 inherently appropriate for adjudication by a Court.

23 If Navient is doing something to inappropriately
24 increase the balance that is owed, that's the kind of
25 allegation which Courts deal with all the time in creditor and

1 debtor situations, and the appropriate relief is to undo that
2 which caused the balance to increase.

3 By statute, any monetary relief is the responsibility
4 of Navient rather than the government. So that if Navient has
5 done something of this nature, Navient is required to either
6 undo it or pay a sufficient amount of money on the obligation
7 to bring it into the status which it should have had. That is
8 the relief which we are seeking.

9 THE COURT: Let me ask you a different question. I
10 noticed in the complaint that we have a plaintiff from
11 California, a plaintiff from Illinois, a plaintiff from New
12 York, and then we have a cause of action in Pennsylvania.
13 Who's the Pennsylvania plaintiff?

14 MR. EDELMAN: We don't have a Pennsylvania plaintiff,
15 Your Honor. We have a defendant who is conducting its
16 servicing operations in Pennsylvania, and our position is that
17 Pennsylvania has -- I believe it's supported by the
18 Pennsylvania decisions is that Pennsylvania's interest is in
19 preventing the use of facilities in Pennsylvania to overcharge
20 and misservice loans regardless of the state of residence of
21 the borrower.

22 THE COURT: All right. Ms. Simonetti, on that last
23 point, do you agree with that because Navient does business in
24 Pennsylvania that they have allowed themselves to be subject to
25 the laws of Pennsylvania and so, therefore, to the extent that

1 even if there is no Pennsylvania resident that's listed as a
2 named plaintiff in the case -- I assume that odds are if the
3 class action proceeded that there would be somebody from
4 Pennsylvania in the case -- but they are not a named plaintiff
5 in the case, that Pennsylvania fair trade law applies?

6 MS. SIMONETTI: We did look at the jurisdictional
7 issue. Because the allegations are that these applications are
8 processed here in Wilkes-Barre, we did not think that
9 jurisdiction could be brought. That's the allegation.

10 THE COURT: Did you want to respond to either the HEA
11 or the --

12 MS. SIMONETTI: With respect to the class issues --
13 the class definitions I don't think actually comport with what
14 plaintiff described. A nationwide class is all individuals who
15 are enrolled in an IDR plan, timely submitted a request to
16 renew, which was, nonetheless, cancelled due to defendant's
17 failure to process prior to the plan's expiration. That would
18 require you to look at each and every one as to why that
19 happened that was the case.

20 And the second piece of it is, or submitted a request
21 for enrollment that was not processed within 25 business days.
22 That, again, raises the same issue of why wouldn't it have been
23 processed within 25 business days, even if that was the
24 standard, which it's not. And then the California class and
25 New York class are the same. All residents who are enrolled in

1 an IDR plan and timely submitted a request to renew and then
2 the plan was cancelled due to failure to process. Again, the
3 question remains the same. Somehow the Illinois class doesn't
4 contain the enrollment piece. It only contains the renewal
5 piece -- I'm sorry -- renewal piece -- not the -- I had it
6 right the first time. And again it's 25 business days.

7 So those classes as defined raise these individuals
8 issues. If these allegations are true, why would a certain
9 application not have been processed within whatever time frame?
10 And I think if you want to appreciate how complex this
11 calculation really is, if you go to the definition section of
12 the application, which is docket 48-1, page 6, that's where the
13 definition starts. And they are very complex with respect to
14 income, family size, the poverty index.

15 It's not really as straightforward. All that
16 information would be derived from those conclusions. With
17 respect to the HEA, I think the best authority is Astra.

18 THE COURT: Let me stick with first the class. So
19 let me go back to you, Mr. Edelman. What is the response to
20 that? In other words, are you saying that each person who
21 applied -- who timely applied and yet at some point in time
22 went into forbearance that we need to look at their entire
23 application to find out what was going on, or are you saying
24 that that you're assuming that if Navient had indicated in
25 their computer program that this person timely filed and it was

1 sufficient, that that's as far you will be looking at terms of
2 each individual application?

3 MR. EDELMAN: That's correct, Your Honor. We have --
4 it is our intention to base this on Navient's computer records,
5 and we allege there's a large number of persons who Navient
6 will show submitted a proper renewal request and who shortly
7 thereafter wound up in the type of forbearance where interest
8 is capitalized and the loan is extended.

9 THE COURT: Ms. Simonetti, let me go back to that.
10 You want to take us back into the application. What they are
11 saying is -- from what I gather is that we're going to rely on
12 your records that you -- we need to know did somebody timely
13 apply for it, and did you approve it effectively, and at some
14 point in time, you know, was there forbearance that occurred in
15 between a timely application that you had -- your records
16 indicate you took and is complete, and then by the time it was
17 actually processed in the manner that would allow them to
18 either continue in an IDR that in between there sometime they
19 were placed in forbearance? So why is that so difficult?

20 MS. SIMONETTI: First of all, I am not sure where Mr.
21 Edelman gets his knowledge Navient's system is from. So
22 there's that. Second --

23 THE COURT: Navient's system, they would, I assume,
24 have or have to keep a record in their system of when an
25 application was made so you know whether it was timely or

1 untimely.

2 MS. SIMONETTI: There are lots of records that are
3 kept for sure. There would be indications of when --

4 THE COURT: My question is that you would have a
5 record of whether or not an application for recertification was
6 timely made, in other words, before the prior recertification
7 had -- whether it's 60 days or whatever it may be.

8 MS. SIMONETTI: I am sure there's a record when it's
9 received, sure.

10 THE COURT: I assume that Navient keeps a record of
11 when they approved it. I mean, there must be something if
12 somebody finally says, oh, this one is okay and --

13 MS. SIMONETTI: Or denied, yes.

14 THE COURT: Or denied, okay. And then so we have a
15 record I assume of when people filed their application. We
16 have a record of when it's approved. We certainly have a
17 record of when it would have expired if it's not recertified,
18 and then we will have a record whether any of those people were
19 put on deferment for some reason.

20 MS. SIMONETTI: Yes, I am sure those dates could be
21 discerned. I think the question is why. So you're looking at
22 the person is approved, a person who is denied, a person who --
23 to use your words -- there's a time line -- and the question
24 becomes why for each one of those individuals. If it's very
25 simple and straightforward and the person submits everything

1 timely and complete day one, maybe it's approved day two. But
2 the question would be why for each and every person. And I
3 think if you go back to even the named plaintiffs, I believe
4 it's the Illinois plaintiff -- no. It's -- maybe -- I lost
5 track.

6 THE COURT: That's okay. One of the three
7 plaintiffs.

8 MS. SIMONETTI: Correct. She said she sends in her
9 application, she thinks it's complete, but she doesn't get a
10 response. Then she sends it again with a letter that said, I
11 hope you received this, I didn't get a response --

12 THE COURT: That's the California. Isn't she the one
13 that then appealed it and it was reinstated --

14 MS. SIMONETTI: I think that sort of begs the
15 question. So where did she send that official application?
16 Was it, in fact, timely? Was it complete? Did she send it to
17 the right place when she sent it again? Why did they have to
18 do that --

19 THE COURT: Let me ask you this. Why wouldn't that
20 be appropriate for a determination at a later time once there's
21 been discovery that's occurred on the issue of class and
22 perhaps a sampling that's done by both sides to try to figure
23 out where we're at in that regard rather than a statement of
24 just pulling out, you know, whether there's millions or not a
25 million of records, I don't know. But it strikes me that --

1 wouldn't that make it appropriate for -- that this motion to be
2 somewhat premature, we ought to allow discovery on the question
3 of class to see exactly where we're at and perhaps sampling
4 would be a way to do that?

5 MS. SIMONETTI: The allegation in the complaint is
6 there's six million loans being serviced on a federal program.
7 So that's a lot of loans. I don't know how many persons within
8 that group would potentially qualify for this. If you notice,
9 the Illinois class goes back ten years. So --

10 THE COURT: I notice each of state classes -- I
11 assume that relates to the statute of limitations.
12 Pennsylvania, I think, was six, and New York was two or three
13 or four whatever. I assume there are breach of contract
14 statute of limitations or something that were used in those
15 states.

16 MS. SIMONETTI: Right. I'm sure that's correct. And
17 I frankly I do believe this is the circumstance where you can
18 discern from this conversation from these allegations that the
19 burden of discovery is not actually justified. So how many
20 would we sample? How much would that cost? What would the
21 burden be in terms of sifting through each and every account to
22 find these dates and look for correspondence? The
23 correspondence that's attached to the first amended complaint
24 reflects this course of communication, you know. The borrower
25 said she submitted it. She didn't get a response. She submits

1 it again. You know, I think that's what you will be looking
2 for. I think the application speaks to that as well. And
3 that's why we made this motion to strike in this case
4 recognizing that it's a unique circumstance.

5 THE COURT: Okay.

6 MS. SIMONETTI: I think the best authority on the
7 point about the HEA is Astra, the U.S. Supreme Court decision.
8 The point of the Higher Education Act is that the Department of
9 Education creates this program, administers this program,
10 regulates the program top to bottom, can fire Navient. That's
11 really why the preemption provision is in this as well. It's a
12 pervasive regulation of these programs.

13 THE COURT: Let me ask you -- the argument that is
14 being made that -- if that's the case, then Navient can --
15 right. Their only remedy would be that the Department of
16 Education fires them, they can make \$40 million on putting
17 people in deferment that shouldn't be in there, keep the money,
18 and then the reaction will be, well, there's no private cause
19 of action because it's really the Department of Education, they
20 are immune from any kind of suit related to that, so the only
21 remedy would be if the government decided, well, we will fire
22 Navient, so the individual borrower who has -- is out that
23 money would really have no remedy at all, right?

24 MS. SIMONETTI: I don't know if the government is
25 immune from suits. I haven't looked at that issue. So I

1 wouldn't know that. But the -- the structure of the law is
2 that all of the oversight responsibility, all of the
3 supervisory authority is given to the Department of Education.
4 And using contract theories or supposed misrepresentation
5 theories to circumvent the structure of the law is just
6 something that I think can be permitted.

7 THE COURT: Anything else then, Mr. Edelman?

8 MR. EDELMAN: With respect to Astra, Astra involves a
9 case where the federal government contracts with someone to
10 administer a public benefit program. Here we have a case where
11 the -- you have notes, loan agreements between either the
12 government or in some cases a private entity and a borrower and
13 that note is being serviced by Navient. Generally if one is
14 party to a note and there's a dispute between the parties as to
15 whether owe a million dollars or a hundred thousand dollars,
16 you can get a Court to decide that. It's a justiciable
17 controversy. It's the kind of thing which Courts determine all
18 the time.

19 That's in essence what happened here. Navient is
20 taking applications which its own records will show are
21 appropriate, and that is why discovery is necessary. We know
22 what Navient is required to keep in terms of records. We have
23 not seen actual records. We think the records will show that
24 people who are according to Navient's own records supposed to
25 be income based repayment plans are getting put into

1 forbearance when there's no indication that the -- their very
2 narrow circumstances essentially involve a temporary hardship
3 or inability to pay, which forbearances are supposed to be used
4 in exists. That is the wrong. We think it's a justiciable
5 wrong, and we think that this Court has the authority and
6 ability to provide relief for it.

7 THE COURT: What about the -- Navient brings up the
8 issue -- Navient is the signatory to the agreements, right, but
9 Navient, L. L. C., is the servicer in this case? So there's a
10 question of whether or not there's an agency that's involved
11 here. Now, I notice in looking at the case like Navient
12 Corporation, Navient Solutions, Inc. and Navient Solutions, L.
13 L. C -- I know both of you described in your introductions how
14 that historically has developed from Sallie Mae over the course
15 of time but --

16 MS. SIMONETTI: Right --

17 THE COURT: Your argument -- the defense argument
18 with respect to whether or not there's an agency -- if -- are
19 you in agreement that one of those three parties assuming there
20 is a proper party in this case that one of those three parties
21 is the proper property? Is it you're just saying you've named
22 more than you are required to name and, therefore, the umbrella
23 corporation in your opinion shouldn't be in there, it's really
24 Navient Solutions, L. L. C., I assume that you would say would
25 be the actual servicer and, therefore, they are the proper

1 defendant -- and I understand you will believe --

2 MS. SIMONETTI: That's correct. If there's any
3 proper defendant in this matter, it's Navient Solutions, L.L.C.,
4 L. C. and Navient Solutions, INC., which was simply the prior
5 name. That incorporation is a holding company. The legal
6 issue is agency. We don't think that's sufficiently alleged.
7 And taking discovery of Navient Corporation, you know --

8 THE COURT: What about the idea -- is Navient
9 actually the signatory to the agreement with the government
10 rather than Navient Solutions, L. L. C?

11 MS. SIMONETTI: The signatory is -- I believe it's
12 the prior name of Navient Corp. Navient L. L. C., I believe is
13 the party to the contract, but that's just the servicing
14 contract. With respect to the promissory note, just to be
15 clear, the parties --

16 THE COURT: The master promissory note, are you
17 taking about --

18 MS. SIMONETTI: Right. The parties there are the
19 Department of Education, the lender, and the borrower. There's
20 no Navient company that's party to that --

21 THE COURT: So the master promissory note?

22 MS. SIMONETTI: Right.

23 THE COURT: I don't know whether you can all get
24 together in terms of whether there's some sort of agreement or
25 stipulation that could be entered into between the two sides as

1 to the appropriate parties so to speak assuming there was
2 liability, who that party would be, the responsible party. The
3 reason I say that is I really don't like cases if at all
4 possible to go along just naming, you know, every iteration of
5 who they were, will be, can be and would be. I usually like
6 the parties -- if there isn't a question of, hey, you got the
7 wrong entity, it's really AT&T you should be naming, not
8 Navient, we don't belong here at all -- if but if we're in
9 agreement that the proper party is named, whether or not there
10 is a suit or not is a different issue. I would like the
11 parties to see if they can work out among themselves so we can
12 get rid of extraneous matter from the docketing from the case
13 that just doesn't need to be there. It makes it easy for us in
14 the long run. So I will encourage to you do that.

15 MR. EDELMAN: We will take Your Honor's suggestion.
16 What's alleged in the complaint is that Navient Corp and its
17 predecessor signed the servicing agreement with the Department
18 of Education, the actual servicing is carried out by a
19 subsidiary, therefore, the only conceivable relationship
20 between the two is one of agency.

21 THE COURT: I get your argument on that. You put
22 that in there. So that -- I just want you to see -- I have
23 this all the time with insurance companies. Liberty Mutual is
24 part of Ohio Casualty, part of whatever, and so the question
25 becomes, did you name the L. L. C. or I.N.C., or whatever. A

1 lot of times you'll have nine different names on there, and I
2 want to know the parties ought to be able to sit down and agree
3 whatever the present iteration is, we can stipulate to the fact
4 under this case at this time this is the proper defendant in
5 the case so that no one is in a position of having agreed to
6 something that is detrimental to them in the future by
7 surprise. But the other side of coin is we get rid of
8 extraneous names we don't need and we don't worry about other
9 matters including discovery on things we don't need to have
10 discovery on in the sense we can get it from whatever the
11 proper party is.

12 I will encourage you to resolve that issue with you
13 can stipulate to is the appropriate party that will satisfy
14 both sides, okay.

15 MS. SIMONETTI: Okay.

16 THE COURT: Anything else then that we need to cover
17 here today?

18 MR. EDELMAN: No, Your Honor.

19 THE COURT: Okay. I can't think of anything. I
20 appreciate your time, effort and preparation. And I'd like to
21 promise you this will be done very quickly, but I do not like
22 to give out fake news. We will get to it as soon as we
23 reasonably can.

24 MS. SIMONETTI: Understood.

25

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Official Court Reporter

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